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No. 85-579

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

WALTER WARREN,

Petitioner,

v.

LOCAL 1759, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES,

Respondent.

**On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Eleventh Circuit**

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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November 8, 1985

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Pursuant to Rule 22.5 of the Rules of this Court, the Petitioner files this short Reply Brief in support of his Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

In its effort to persuade this Court to deny the Petition, Respondent has failed to address the crux of this case, to wit: whether the jurisdictional grant of 28 U.S.C. § 1331 can be invoked by a civilian federal employee who desires redress from a union's violation of its duty of fair representation.

CONGRESS HAS MANIFESTED NO INTENTION, EITHER EXPRESS OR IMPLIED, TO DEPRIVE FEDERAL COURTS OF JURISDICTION OVER A FEDERAL EMPLOYEE'S DUTY OF FAIR REPRESENTATION CLAIM.

Respondent argues at length that the "statutory scheme" of Title VII of the Civil Service Reform Act (CSRA) shows a congressional intent to vest employees' duty of fair representation claims solely with the Federal Labor Relations Authority (FLRA). However, precious little in the way of *affirmative* congressional intent is cited by Respondent to support its theory. Thus, through its silence, Respondent apparently admits that Congress did not *expressly* act to divest the federal courts of jurisdiction over federal employees' duty of fair representation claims when it enacted Title VII of the CSRA.

Respondent's main contention appears to be that because Title VII of the CSRA provides for judicial intervention in only a few specified circumstances, Congress therefore meant to proscribe federal court jurisdiction in every other instance, including duty of fair representation claims. Respondent's analysis, however, ignores the history and development of the judicially enforced duty of fair representation.

Under both the National Labor Relations Act (NLRA) and the Railway Labor Act (RLA), federal courts have only limited jurisdiction over the administrative schemes created by Congress. *See, e.g., Leedom v. Kyne*, 358 U.S. 184 (1958). However, this congressional limit on the federal courts under the NLRA and RLA did not deter

this Court from holding that 28 U.S.C. § 1337 provided the federal courts with ultimate supervisory authority over unions, which had been given broad powers of exclusive representation.* *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944); *see also Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192 (1944). When Congress enacted the CSRA, it was well aware of this Court's precedents creating and enforcing the duty of fair representation. Had Congress wanted to enshrine the FLRA as the sole and exclusive tribunal for adjudicating federal employees' duty of fair representation claims, it would have said *something* to that effect.

Further basing its arguments on negative implications derived from congressional silence, Respondent contends that Congress' failure to enact an analog to 29 U.S.C. § 185 (§ 301) in the CSRA shows that Congress meant to deprive federal courts of jurisdiction over civilian federal employees' duty of fair representation violations. However, "it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 241 (1970).

Plainly and simply, Congress' failure to enact an analog to § 301 in the CSRA is irrelevant to the instant case. It is quite clear that unless otherwise stated by Congress, 28 U.S.C. § 1331, the general federal question jurisdiction statute, provides the federal courts with a

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* It must be remembered that all suits within the jurisdiction of 28 U.S.C. § 1337 can also be brought under § 1331 of the Judicial Code. Wright & Miller, Federal Practice and Procedure, § 3574 (1975). Section 1337 is merely the more specific of the two jurisdictional grants.

basis to adjudicate Petitioner's claims. *See* Boyce and Turner, *Fair Representation, the NLRB, and the Courts*, University of Pennsylvania Industrial Research Unit, (1984). As Congress has given no affirmative indication that it wished to deprive the courts of jurisdiction over the instant fair representation claim, 28 U.S.C. § 1331 provides the appropriate basis for jurisdiction.

CONCLUSION

The so-called "differences" between the CSRA and its private sector counterparts, the RLA and the NLRA, provide no basis for the lower court's holding that civilian federal employees may not invoke the federal courts' jurisdiction to redress a duty of fair representation violation. The Court should grant this Petition for a Writ of Certiorari to examine an issue which affects many thousands of federal employees, and over which lower federal courts have issued conflicting opinions.

Respectfully submitted,

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